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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

CHARLES L. ABRAHAMS,
for the Estate of Pearl Abrahams,
Charles L. Abrahams, individually

Petitioners,

vs..

JACOB HEALTH CARE
CENTER, LLC; PREMIER
MANAGEMENT, INC.

Respondents.

On Petition for a Writ of Certiorari from the California Supreme Court

CORRECTED PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether litigants' (especially the elder and pro se litigant) due process and equal protection rights pursuant to the Federal Constitution have been denied by a judicial system which has become dysfunctional jeopardizing our democratic ideals.

PARTIES TO THE PROCEEDING

Charles L. Abrahams
Estate of Pearl Abrahams
Jacob Health Care Center, LLC
Premier Management, Inc.

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The Petition for Review by the Supreme Court of California was summarily denied. The decision was filed on January 3, 2007 (App. 1.)

The Court of Appeal, Fourth Appellate District's opinion (App. 2) was filed on October 13, 2006 and was not published.

The Superior Court Order striking the verified statement of Charles L. Abrahams to disqualify Judge Joan Lewis (App. 28) was filed on September 30, 2004.

STATEMENT OF JURISDICTION

Certiorari jurisdiction over decisions of State Courts is derived from 28 U.S.C. §1257. Whenever the State Courts deny equal protection of the laws, contrary to the Fourteenth Amendment of the Federal Constitution, this Court must protect the constitutional rights "and cannot decline jurisdiction when the denial of rights are plain." *Rogers v. Alabama,* 192 U.S. 230, 231 (1903).

The intent of the supremacy clause is to empower and call on the state judiciary to apply federal law when relevant. All tribunals must give precedence to the Federal Constitution, which

includes the duties of the U.S. Supreme Court. *Marbury* v. *Madison*, 5 U.S. 1 (Cranch) 137, (1803).

When laws are not applied equally, there is an invidious discrimination. "Equal protection of the laws is a pledge of the protection of equal laws." *Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

When there is a federal question, the state should be given the opportunity to address the question. Petitioners have established the federal claim was adequately presented and should have been addressed at each level of review. *Webb v. Webb,* 451 U.S. 493, 500-501 (1980). (App. 40-48, 52-54, 64-65, 67-69, 73-75.)

When the highest court in a state does not address the federal question, it will be assumed it was "due to a want of proper presentation," unless the aggrieved party can affirmatively show the contrary..." *Exon Corp. v. Edgerton*, 462 U.S. 176, 181 (1983).

When the record shows the federal claim was presented it should be regarded as having been adequately presented. *Bryant v. Zimmerman,* 228 U.S. 63, 66-67 (1928).

The Supreme Court's jurisdiction does not depend on whether the State Court addresses the federal claim. It is enough

that the claim was presented, and not accepted. *Illinois v. Gates,* 462 U.S. 63, 67 (1928). Once a federal claim has been fairly presented in the State Courts, the exhaustion requirement has been satisfied." *Picard v. Conner*, 404 U.S. 270, 275 (1971).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves federal questions raised under the U.S. Constitution, 14th Amendment (App. 57, 63-65, 69.) "The constitution requires notice and an opportunity to be heard before being deprived of damages by striking any prayer from a complaint" 28 U.S.C., Section 455 provides procedures and policies to be applied when there is a motion to disqualify a judge. Federal and State cases provide authority interpreting California Code of Civil Procedure Section 170. Breaches §§1,2,4,5 and 7 of Canon 3 of the ABA Judicial Code were discussed to support the appearance of partiality requiring recusal. (App. 41-54.)

California Code of Civil Procedures §128.5, or §177 was discussed regarding the impropriety of the sanctions imposed against Petitioners (App. 56.) In addition, CCP §1008 encourages motions for reconsideration (App. 60.)

STATEMENT OF THE CASE

Petitioners are Charles L. Abrahams, an attorney, and the son of the late Pearl Abrahams, and he represented the Estate of Pearl Abrahams, also a Petitioner.

Pearl Abrahams resided in Respondent's nursing wing where elder abuses occurred. Mrs. Abrahams passed away on March 28, 2001. The complaint filed reflecting elder abuse was filed on May 29, 2003. There were ongoing settlement negotiations when the complaint was filed which was alleged in the complaint which would have tolled the statute of limitations, Petitioners were not allowed to amend their complaint to cure the deficiency in the allegations.

Petitioners brought action against Respondent Jacob Health Care Center, LLC (JHCC) and Premier Management ("Premier"), the owners and operators of an assisted living, intermediate care, and a nursing facility.

Petitioners filed a complaint requesting elder abuse remedies, sentimental value of family pictures which were confiscated, and other damages, including punitive damages. The

constructive fraud, intentional infliction of emotional distress, assault and battery, lack of informed consent, and fraudulent misrepresentation causes of actions were all dismissed without leave to amend. The Court sustained the demurrers because medical malpractice was alleged, and the complaint was filed after the two-year statute of limitation for professional malpractice. The following allegations in Paragraph 32 of the Complaint reflected 'recklessness', and not "negligence" such as:

> a. There was a failure to care for Mrs. Abrahams' needs.
> b. She was not monitored and the decedent was in a fight.
> c. There was faulty medical equipment.
> d. The decedent was drugged and left to lay in her own excrement and urine for long periods of time.
> e. Diapers were not provided.
> f. Mrs. Abrahams' body had bruises, she was dehydrated, and she was unable to eat on her own.

Judge Lewis failed to recognize the written contract between the parties which was attached to the Complaint and stated months after making a decision denying the motion for clarification that there was an oral contract and the statute of limitations is two years.

Respondents' Counsel informed the court he would accept service for Premier at the October 10, 2003 hearing. Premier

defaulted by not responding to the complaint. The Trial Court promised to, but did not address the effect of Premier's default. such as a waiver of the defenses.

The Trial Court, Court of Appeal and the California Supreme Courts did not address Petitioners' defenses to the demurrers, motion to dismiss, or the allegations in the motion to disqualify Judge Lewis.

Petitioners contended Defendants waived their defenses because Premier didn't join in the demurrers. The Court of Appeal did not search or adequately consider the record, for example, the Court stated the appearance or service on Premier was a disputed fact.

In addition, Respondent violated California Rules of Court Rule 313 and CCP §430.80 and admitted petitioners' contentions were correct by not refuting Petitioners' statements or arguments.

The Court of Appeal, by eliminating the Estate as a party apparently believes a *pro per* appellant, even if he be an attorney, should not be given the same respect as other appellants similarly situated, resulting in further federal due process violations. This Supreme Court's review should be granted to maintain the integrity

of our judicial system designed to preserve common law and statutory rights created by the Elder Abuse Act.

The Court of Appeal and the California Supreme Court did not decide the propriety of sustaining demurrers on a *de novo* basis in accordance with well-established principles, but relied on what the Court of Appeal stated was a presumption of correctness.

The Court of Appeal overlooked principles referred to in Appellants' Opening Brief such as: "...a demurrer on the ground of the statute of limitations must show unambiguously that the action is barred." *Roman v. County of Los Angeles,* 85 Cal. App. 4th 316, 324 (2000).

Petitioners explained to the Trial Court, Appeal Court, and California Supreme Court that:

1. Elder Abuse cannot be considered an intentional tort, or medical malpractice, because *Delaney v. Baker,* 20 Cal.4th 23, 25 (1999) described "recklessness" and not "negligence" as the one essential element necessary to impose liability for elder abuse. The treatment of the late Pearl Abrahams described in the complaint was similar to the "abuses" described in *Delaney v. Baker,* supra..

2. The Court of Appeal stated Appellants argued that the Trial Court "erred as a matter of law by overruling *Delaney v.*

Baker, supra. .The Court of Appeal stated that *Delaney* does not stand for Appellants' contention that the statute of limitations for medical malpractice is not applicable because the *Delaney* California Supreme Court did not discuss the statute of limitations. (App. 21, 22.)

Judge Joan Lewis was assigned the case after Judge Vincent Difiglia had retired, and expressed her opinion that his court orders, even if oral, once made, cannot be corrected or modified. Petitioners filed a motion for clarification of Judge DiFiglia's oral order and distinguished the two cases the Judge stated his staff told him served as a basis for justifying a two-year statute of limitation. Judge Joan Lewis claimed Judge Defiglia's Court order was effective on October 10, 2003 when Judge Difiglia orally adopted his tentative ruling. Judge Lewis did not consider the fact Judge Difiglia's order required a signed court order to be effective to dismiss the various causes of action.

The Court of Appeal stated Petitioner(s) did not provide the Court with the applicable standard of review. The Appellants in their reply brief stated, "It is the Court's role to determine as a matter of law whether Plaintiff has stated a cause of action under

any possible legal theory." *Barquis v. Merchant's Collection Association*, 7 Cal. 3rd 94, 108-114 (1972).

3. The Court of Appeal didn't consider Petitioners' substantive and procedural arguments because the Court of Appeal stated in their opinion the Court relied on a presumption of correctness of the Trial Court's rulings.

The Court of Appeal referred to but did not address the applicability of Code of Civil Procedure ("CCP") §338, a three-year statute of limitation, which applies when there is a statutory created cause of action and the statute does not have a period of limitations. (App.10.) CCP §338 should apply because "physical abuse" includes, according to the statutory definition, the allegations of "assault and battery". The "conversion," cause of action, which is a common law tort has a three-year statute of limitations, is part of the definition of "financial abuse."

The Appellants were not given an opportunity to cure any alleged defect before the causes of action were dismissed.

On February 20, 2004 Judge Joan Lewis held a hearing on the demurrer to the two remaining causes of action; the conversion and unfair business practice claim, and a second motion to strike. The motion requested the striking of punitive damages, attorney

fees, and double damages pursuant to Probate Code 859, and the sentimental value of a box of family pictures and other personal property which had been given away by Respondent.

Judge Joan Lewis dismissed the punitive damage prayer because the causes of action were allegedly medical malpractice, or malice wasn't alleged, although the allegations stated the Defendants' acts were done with "malice".

Judge Lewis allowed the retention of all causes of action against Premier. Judge Lewis ruled on February 27, 2004 that if the rescission cause of action was repetitive of the contract cause of action, then the Complaint should be amended. The causes of action were different.

The tentative decision was to strike sentimental value, even though Civil Code 3335 is clear an unambiguous. because cites were not presented. Counsel did cite cases in his pleading and at the hearing on February 20, Counsel provided at the hearing the Court with other citations which he repeated at the behest of Judge Lewis.

The tentative ruling denied the double damages pursuant to the Probate Code because the ruling stated there was no allegation reflecting the conversion of property from the Estate. The

Complaint included a cause of action for conversion, which Counsel explained to Judge Lewis rendered the tentative ruling erroneous.

Judge Joan Lewis at the hearing indicated the Court would consider Counsel's arguments and would personally prepare the opinion. Judge Lewis a week later adopted the tentative ruling almost verbatim, stating citations were not provided to support sentimental value and property was not alleged to be converted, both sentimental value and double damages were therefore stricken.

The Court of Appeal stated, contrary to the record and the Court's basis for the ruling, that the surviving causes of action did not support the damages. (App. 9.)

A day after receiving the Court Order on February 27, Petitioners filed an *ex parte* motion for an extension of time to file a response to the Court Order. Petitioner was waiting for a signed Order before filing a motion for reconsideration of the order.

The Court of Appeal went outside the record apparently because Judge Joan Lewis believed Petitioners had no right to request reconsideration of Judge DiFiglia's tentative ruling, and shouldn't have filed a motion to disqualify Judge Lewis (App. 6, 18.) The Court of Appeal stated Petitioner was close to being

sanctioned for filing a frivolous appeal. (App. 24.).

Respondent's Counsel was served with the *ex parte* motion yet contended there was no reason excusing Petitioners' alleged failure to file a second amended complaint. Judge Lewis made the same finding before dismissing the action for failure to file an amended complaint.

Soon after receiving the Order, Mr. Abrahams left for Washington D.C. for a week. The airline tickets were copied and attached to the ex parte motion. Counsel's law clerk filed a declaration confirming that he followed the procedure for service of the motion to disqualify Judge Lewis. The Court of Appeal overlooked the record when stating the motion was "signed" but not filed (App. 9, 22-23.)

Petitioners' copy of the motion was submitted to complete the record. The record before the Court of Appeal did contain a filed stamped copy which was filed after Petitioner filed his copy.

Judge Lewis at the April 23, 2004 hearing stated the hearing was to determine the merits of Respondent's demurrer. The Judge corrected herself by stating the only matter before her was a motion to dismiss the Complaint. Counsel agreed to the tentative ruling to dismiss the Complaint.

Judge Lewis breached the Judicial Canon of Ethics and Rules of Court because *ex parte* requests for procedural matters are permitted and such ex parte pleadings must be filed by Rules of Court.

When Petitioner mentioned the motion, Judge Lewis stated "It's my understanding that some ex parte pleadings were returned back to you. You sent them in. You didn't file them – or didn't come in for an ex parte request. The following colloquy resulted in the dismissal and ejection of Petitioner from the courtroom:

> MR. ABRAHAMS: Your honor promised me a ruling, and that means the Court has to exercise some discretion ... That ruling indicated to me that this Court did not consider the arguments ...
>
> My due process rights ... -have been ignored...
>
> I did not receive that motion back... There was, as far as I was concerned, a pending motion to allow me time to amend,... Because our Court of Appeals encourage me to bring motions for reconsideration, ...I should not be chastised for that.
>
> THE COURT: Mr. Abrahams, I'm very, very close to asking you to leave this courtroom... The motion to dismiss and my tentative ruling on the motion to dismiss was to grant the motion to dismiss. I did not hear any reason from you that I should change my mind on it, sir.

My motion- - your motion to dismiss is granted. The case is dismissed. You bring the motion you have to do for the 1700.

MR. ABRAHAMS: I want to note that just now - -

THE COURT: Mr. Abrahams, I'll have you escorted out, sir.
(Mr. Abrahams exits the courtroom)

The Court of Appeal stated "The Court announced 'The case is dismissed. ' and then speculated the Court's written order, issued immediately after the hearing (dated April 23, 2004) clarifies its oral statement..." (App.10.)

Petitioners pointed out in their briefs that the minute order referred to by the Court of Appeal stated the tentative decision was confirmed. The Court of Appeal referred to the minute order as a "written order." (App. 10.)

Petitioners filed a Notice of Appeal after the dismissal and in the Notice of Appeal stated, the court orders were void. In addition, Petitioners explained the Trial Court judge was of the opinion that oral orders need not be in writing to be effective, therefore there was a final appealable judgment. After the dismissal of the first appeal because the judgment has "yet" to be filed, Petitioners filed an ex parte motion requesting the Trial Court to

perform its ministerial duty by entering a judgment. Petitioners supported the motion with the Petitioners' pleadings in the Appeal Court opposing the motion to dismiss.

In order to appeal the final order of dismissal, Petitioners filed a motion to disqualify the judge hoping a judgment would be entered allowing Petitioners to appeal.

Petitioners' one hundred and sixty nine (169) page Writ was accepted by the Court and was filed to appeal the denial of the motion to disqualify and to request the entry of a judgment.

The Court of Appeal summarily denied the Writ, even though a writ was the exclusive remedy when a motion to disqualify a judge in California is denied. CCP" §170.

Petitioners filed a motion to disqualify Judge Joan Lewis and raised federal questions which were presented in the Memorandum supporting the motion to disqualify Judge Lewis. (App.35.)

The standard of review apparently was not applied *de novo* to the demurrers or the motion to disqualify Judge Lewis by the Court of Appeal when the Writ and appeal were filed. The California Supreme Court summarily denied the Petition for Review. (App. 1.)

The Court of Appeal concluded that the action was dismissed but did not explain how the action can be dismissed against Premier (App. 10, 11.) Premier did not file the motion to dismiss. The Trial Court judgment did not refer to the terminating sanctions, as the Court of Appeal indicated (App. 12.)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The Petitioners made the following arguments raising federal questions and discussed the U.S. Supreme Court cases referred to herein in the motion to disqualify.

Any real chance of succeeding on the merits of the demurrers or motions to dismiss were lost when the Court makes decisions based "on an ex parte examination of the records." *Douglas v. California, 372 U.S. 353, 356, 358 (1962).*

It is fundamental to our judicial system that laws be applied equally. The U.S. Supreme Court in *United States v. Chronic,* 466 U.S. 648, 655 (1984) stressed the importance of equal application to all litigants in an adversary system. "[A]n adversarial trial promotes decisions that are well grounded in both the law and the facts because each side will with partisan's zeal, bring to the court's attention all the favorable to that side." (App. 68, 69.)

Legislation has been enacted because the poor and the elder need protection and the statutes were enacted to provide equality. Although the elders as a group have power, those in nursing homes have continued to be forgotten. Those in nursing homes are discarded by their healthy brethren. The court's failure to apply the Rules of Court to effectuate the purpose of the Elder Abuse Statute demonstrated an invidious discrimination and inference that there is a bias in favor of the rich. *Griffin v. Illinois* 351 U.S. 12 (1955).

Judge Joan M. Lewis did not apply the objective test when considering the allegations in Petitioners' supporting declaration, but stated this Court of Appeal should address the disqualification of Judge Lewis because the Petitioner's Declaration reads like an appellate brief. Judge Joan Lewis stated there must be a reasonable conclusion that the Judge is biased. (App. 33.)

If this Court does not exercise its supervisory powers, it would render it impractical and too costly for attorneys to pursue actions involving elder abuse. Litigation is expensive and time consuming. When Judges takes advantage of the weaknesses of our judicial system and chill any effort to protect the elder, the time and expense to the litigant or his Counsel can easily force a dismissal,

and dissuade elder abuse actions. The elder would lose their rights by not resorting to the Courts for protection. When there is an abuse of power a judge should be disqualified.

There was a denial of a motion for disqualification and, the exclusive remedy of the writ process in operation was unconstitutional *Yick v. Wo,* 118 U.S. 356 (1886).

Every democratic judicial system should safeguard against tyranny; tyrannical governments have punished those who are weak or helpless politically especially those elders confined to nursing homes. Anyone who has power should be sensitive to its possible abuse. The true test of a humane society, and test of a democracy is the way "elders" are treated in the communities.

A judge should not be reluctant to reconsider past rulings when apprised of possible errors of law. The Courts, Trial and Appellate, should have considered Petitioners' contentions. The Trial Court should not have ejected Counsel from the courtroom for expressing Petitioners' views.

Judge Lewis revealed a lack of sensitivity to the goal of fairness, especially by ignoring the mandate CCP §1008 and the inherent power to correct Court errors. Judge Lewis did not decide whether recusal was required by applying the statute discussed in

the motion. There was an appearance of partiality which is disqualifying according to California and U.S. Supreme Court mandates interpreting the Federal Constitution.. By ignoring statutes and, in effect, rewriting them, Judge Joan Lewis has violated the doctrine of separation of powers which is enshrined in the constitution and is fundamental to the preservation of our civil liberties. *Brydonjack v. State Bar,* 208 Cal. 439, 442, (1929).

When Judge Joan Lewis denied disqualification because legal rulings are insufficient to establish bias, the objective test was not applied to all the allegations. (App. 31-32.) In addition Judge Lewis did not consider all the grounds for disqualification such as the breach of a number of Canon of Ethics explained in the memorandum supporting the motion. (App.32-33.)

The Court of Appeal when considering the writ should have given due consideration to the motion for disqualification and due process ramifications in order to maintain the integrity of our judicial system. The motion for disqualification must remain a vital part of our judicial system serving to preserve a democratic society and the right to due process to its citizens.

Petitioners asserted that their right to due process of law under the state and federal constitutions were violated because their

matter was not heard before impartial judges. *People v. Brown,* 6 Cal.4th 322 (1993.) Partiality is fostered because our judiciary treats motions for disqualification of a judge as a personal affront and attempts are made by our judiciary at reprisals.

The Court of Appeal came close to sanctioning Counsel without considering the record and Petitioners' expression of due process violations. (App. 24-26.)

The Court of Appeal dismissed the first appeal because an entry of judgment had "yet" to be made. Petitioners were unable to appeal after Judge Joan Lewis dismissed the case because the ministerial duty to request to enter a judgment was not mandated by the Court of Appeal.

The Court of Appeal in the opinion (App. 16-19) stated there were no unusual circumstances surrounding the motion to disqualify Judge Lewis warranting treating the appeal as a writ.

This Supreme Court in its supervisory capacity should require that the Court of Appeal in the future prepare a written opinion and grant oral arguments before denying litigants the right or privilege to appeal the denial of a motion to disqualify. This case has demonstrated how the elder's due process rights are violated when a writ is summarily denied. Petitioners' request for a

ministerial duty to be performed was also summarily denied even though the writ is the only means to obtain a judgment so Petitioners were able to appeal.

The Court of Appeal in their opinion stated the appeal was of a judgment entered against "him" (App. 2.) This statement creates a clear inference that the Court of Appeal has a bias against Petitioners. The Court of Appeal did not consider the Estate of Pearl Abrahams as an Appellant which creates an inference that a pro persona litigant does not receive equal treatment. The Court of Appeal did not recognize that the Estate as an entity may have more than one beneficiary and therefore rights of others besides Mr. Abrahams were arbitrarily denied when the Court did not consider Petitioners' pleadings.

The Court of Appeal accepted Judge Joan Lewis' statement that the motion for disqualification was based solely on adverse rulings. The Court of Appeal should have complied with Petitioners' request and have treated the appeal as a writ and decided whether Judge Lewis should be disqualified as a matter of law. Judge Lewis was informed in the motion that the declaration was not focused on the adverse rulings, because there was an *ex parte* review of the Respondent's pleadings. Petitioners informed

Judge Lewis that the Supreme Court in *Kloepfer v. Commission on Judicial Performance*, 49 Cal.3d. 826, 838, (1989) stated "a Judge need not seek to harm a litigant or an attorney; disregard for the legal system in general will suffice for disqualification". (App. 54.)

1. THE FEDERAL QUESTIONS WERE ADEQUATELY PRESENTED IN THE TRIAL COURT AND THE OTHER LEVELS OF APPEAL; THEY WERE SUBJECTED TO A *DE NOVO* REVIEW ON APPEAL

Petitioners discussed to the Federal Constitution, the U.S. Supreme Court decisions, and federal decisions when raising the federal questions of due process discussed in their motion to disqualify. *In re Bernard, 31 Fed 3d 842, 847 (9th Cir. 1994)* states "it is an attorney's obligation to maintain the integrity of our system by filing motions for disqualification. This applies to both federal and state cases."...

"Pursuant to the canons of judicial ethics, every judicial officer must satisfy himself or herself that he or she is actually unbiased toward a party and, is based on a universal standard, that her impartiality is not reasonably subject to question. The following canon is important to the administration of justice:" (App. 41.)

CANON 3: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE PARTIALLY AND DILIGENTLY. (Appendix B, p.2).

Petitioners referred Judge Lewis to I*n re Bostons Children First,* 244 Fed 2d 164 (1st Cir. 2001) which stated that a breach of

the judicial ethics in most instances is automatically disqualifying. (App. 42.)

The U.S. Supreme Court in *Fuentes v. Shevin,* 407 U.S. 67 (1971) explained the importance of a meaningful hearing. (App. 44.)

Berger v. U.S., 255 U.S. 22 (1921) was cited for the proposition that "the judge must pass on the legal sufficiency of the declaration, but may not pass on the truth of the matters alleged. Moreover, disqualification of a judge is self-enforcing, and a motion and hearing are not required. (App. 46.)

U.S. v. Forest, 886 558 F.2d (3rd Cir. 1989) stated when a judge engages in ex parte communications with counsel, even if the attempt was to prompt a settlement, such allegation is sufficient to require the judge's recusal. (App. 48.)

In *Edgar v. K.L.,* 93 F.3d 256 (7th Cir. 1996), a judge was disqualified for repeatedly going outside of the presence of counsel to meet with experts to discuss the merits of the case. (App. 48.)

Throughout the proceedings, it became obvious that Judge Lewis was assuming the role of judge and attorney. Petitioners referred Judge Lewis to *Reserve Mining Co. v. Lord,* 529 F.2d 181 (8th Cir. 1976) which stated:

> (a) judge best serves the administration of justice by remaining detached from the conflict between the parties. (*Id.* at p. 186.) By assuming the roles of judge, attorney and the witness in the same proceeding the trial judge abandons the impartiality with which to he is charged.... (App. 49.).

Liteky v. United States, 510 U.S. 540 (1994) was cited to make it "clear that Judge Lewis' attitude may be disqualifying if the judge's rulings reflect extra judicial knowledge or motives." (App. 53.) Moreover, when the judicial rulings reflect a pervasive bias, the judge should disqualify him or herself (App. 53.)

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988) was discussed to indicate that what matters is not the reality of a bias but its appearance, and Petitioner indicated that Judge Lewis' rulings and ex parte discussions gave the appearance of partiality (App. 53.) Petitioners indicated in their motion:

> "Our judicial system is based on fairness to litigants. In *Liteky*, the standard for disqualification was announced:
>
> Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude, or state of mind leads to a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified. In matters of ethics, appearance and reality often converge as one. See *Offutt v. United States,* 348 U.S. 11, 14 (1954). ([J]ustice must satisfy the appearance of justice.)'"(App. 53-54.)

Petitioners pointed out that motions for reconsideration, if not considered, can result in a miscarriage of justice. "A court could not operate successfully under the requirement of infallibility of its interim rulings. Miscarriage of justice results where a court is unable to correct its own perceived legal errors...." *People v. Castello,* 65 Cal.App. 4th 1242, 1249 (1998). (App. 62.)

Personal antagonism between a judge and a party interferes with the administration of justice. "Judge Lewis has evidenced personal antagonism toward a party by dismissing the Complaint and ejecting Mr. Abrahams from courtroom 65, and such was unjustified under the circumstances, Judge Lewis violated Mr. Abrahams' due process rights, and such is the basis for recusal. *Offut*, supra. (App. 64.)

This Judge showed partiality by not entering a judgment after Plaintiffs established Judge Lewis has the ministerial duty to enter a judgment.

Judge Lewis has failed to recognize her role in our adversary system. This is an unusual case where a judge's rulings are per se disqualifying because the judge's rulings were one sided because the pleadings of the defendants were the only ones considered. *Liteky v. U.S.*, 510 U.S. 540, 555 (1994); *Armstrong v.*

Manzo, 380 U.S. 545, 552 (1965); *Fuentes,* supra, p.81.

Any real chance of succeeding on the merits of the Plaintiffs' Opposition to the Motion and Demurrers is lost "when the Court decides on an *ex parte* examination of the record". *Douglas v. California,* 72 U.S. 353, 356 (1962). (App. 68.)

There can be no question that laws must be applied equally. The U.S. Supreme Court in *United States v. Chronic,* 466 U.S. 648,655 (1984) stressed the importance of equal application to all litigants of the adversary system. "[A]n adversarial trial promotes decisions that are well grounded in both the law and the facts because each side will with partisan's zeal, bring to the court's attention all the favorable to that side." (App. 69.)

2. THIS WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE JUDGE JOAN LEWIS IMPROPERLY LEGISLATED AND HAS OVERRULED WELL-ESTABLISHED SUPREME COURT AND FEDERAL PRECEDENTS.

The need for this U.S. Supreme Court to supervise the process by which decisions are made is far greater than if the Petitioners' personal interest in procedural fairness is at stake. The motion to disqualify a judge has apparently been losing its significance to a healthy and fair judicial system.

Judge Joan Lewis and the Court of Appeal did not reveal a familiarity with the record. The Court of Appeal appeared to treat Trial Court Orders as creating irrebutable presumptions of corrections.

3. THIS WRIT SHOULD BE GRANTED BECAUSE PETITIONERS HAVE BEEN DEPRIVED OF THEIR CONSTITUTIONAL RIGHT OF ACCESS TO THE COURTS

"Due process" requires "notice and an opportunity to be heard." The denial is more egregious in light of the misrepresentations of the record by the Respondent. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The right to procedural due process is " . . . 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Every litigant is entitled to a full hearing. "The 'hearing' is the hearing of arguments and consideration of a party's pleadings. If the one who determined the facts which underlie the order has not considered the Petitioners' contentions, it is manifest that the hearing has not been given." *Morgan v. U.S.*, 298 U.S. 468, 480-481 (1935).

4. THIS PETITION SHOULD BE GRANTED BECAUSE THE COURTS AT VARIOUS LEVELS EXCEEDED ITS AUTHORITY AND WERE IN CONFLICT WITH ITS OWN AND OTHER PRECEDENTS AND VIOLATED THE SPIRIT AND LETTER OF THE LAW

When judicial power is wielded to silence advocacy there is a need of this Court's attention. Public confidence in our judiciary is a concern of this Court and judicial tyranny threatens the very moral fiber of our society and affect the values which pertain to the qualities of life that are concomitant to our democratic way of life.

Disciplinary powers in the case at bar have been abused in a manner which inhibits and chills and precludes open and vigorous analysis and debate to the correctness of our judicial decisions.

"Lawyers [must] be able to make honest, good faith efforts to present their client's cases," *In re McConnell*, 370 US 230, 236 (1962).

"[A]n attorney is not an insurer...that his client will win...he has a duty to represent his client zealously...[by seeking] any lawful objective through legally permissible means...for adjudicating a lawful claim, issue, or defense." ABA Code of Professional Responsibility, EC 7-1, DR 7-101 (A)(1).

The California Supreme Court *In Re Marriage of Flaherty*, 183 Cal. Rptr. 508, 514 (1982) stated, "...The strong public policy in favor of the peaceful resolution of disputes in the courts requires that attorneys not be deterred from pursuing legal remedies because of the fear of personal liability...to decide otherwise...[would] prevent Counsel from devoting their entire energies to their clients.

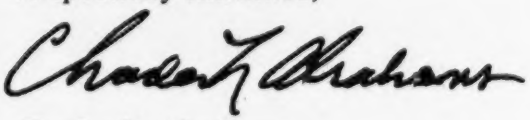
When attorneys are cavalierly sanctioned there is a foreboding of a collapse of our judicial system when civil litigants are sanctioned for their faith in the fair treatment of their civil cases by our judiciary.

CONCLUSION

Wherefore, in consideration of the significance of the questions presented, a Writ of Certiorari should issue to review the judgment and opinion of the California Supreme Court.

Dated: San Diego, California, April 29, 2007.

Respectfully submitted,



Charles L. Abrahams

FEDERAL AND STATE STATUTES

AND

JUDICIAL CANON OF ETHICS

28USC455

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to

inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge

to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

Code of Civil Procedure Section 338

Within three years:

(a) An action upon a liability created by statute, other than a penalty or forfeiture.

(b) An action for trespass upon or injury to real property.

(c) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. The cause of action in the case of theft, as defined in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.

(d) An action for relief on the ground of fraud or mistake. The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

(e) An action upon a bond of a public official except any cause of action based on fraud or embezzlement is not deemed to have accrued until the discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action upon the bond.

(f) (1) An action against a notary public on his or her bond or in his or her official capacity except that any cause of action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action.

(2) Notwithstanding paragraph (1), an action based on malfeasance or misfeasance shall be commenced within one year from discovery, by the aggrieved party or his or her agent, of the facts constituting the cause of action or within three years from the

performance of the notarial act giving rise to the action, whichever is later.

(3) Notwithstanding paragraph (1), an action against a notary public on his or her bond or in his or her official capacity shall be commenced within six years.

(g) An action for slander of title to real property.

(h) An action commenced under Section 17536 of the Business and Professions Code. The cause of action in that case shall not be deemed to have accrued until the discovery by the aggrieved party, the Attorney General, the district attorney, the county counsel, the city prosecutor, or the city attorney of the facts constituting grounds for commencing the action.

(i) An action commenced under the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code). The cause of action in that case shall not be deemed to have accrued until the discovery by the State Water Resources Control Board or a regional water quality control board of the facts constituting grounds for commencing actions under their jurisdiction.

(j) An action to recover for physical damage to private property under Section 19 of Article I of the California Constitution.

(k) An action commenced under Division 26 (commencing with Section 39000) of the Health and Safety Code. These causes of action shall not be deemed to have accrued until the discovery by the State Air Resources Board or by a district, as defined in Section 39025 of the Health and Safety Code, of the facts constituting grounds for commencing the action under its jurisdiction.

(l) An action commenced under Section 1603.1, 1615, or 5650.1 of the Fish and Game Code. These causes of action shall not be deemed to have accrued until discovery by the agency bringing the action of the facts constituting the grounds for commencing the action.

(m) An action challenging the validity of the levy upon a parcel of a special tax levied by a local agency on a per parcel basis.

(n) An action commencing under Section 51.7 of the Civil Code.

Code of Civil Procedure Section 170 – 170.9

Section 170. A judge has a duty to decide any proceeding in which he or she is not disqualified.

Section 170.1

(a) A judge shall be disqualified if any one or more of the following is true:

(1) (A) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(B) A judge shall be deemed to have personal knowledge within the meaning of this paragraph if the judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is to the judge's knowledge likely to be a material witness in the proceeding.

(2) (A) The judge served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for any party in the present proceeding or gave advice to any party in the present proceeding upon any matter involved in the action or proceeding.

(B) A judge shall be deemed to have served as a lawyer in the proceeding if within the past two years:

(i) A party to the proceeding or an officer, director, or trustee of a party was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law.

(ii) A lawyer in the proceeding was associated in the private practice of law with the judge.

(C) A judge who served as a lawyer for or officer of a public agency that is a party to the proceeding shall be deemed to have served as a lawyer in the proceeding if he or she personally

advised or in any way represented the public agency concerning the factual or legal issues in the proceeding.

(3) (A) The judge has a financial interest in the subject matter in a proceeding or in a party to the proceeding.

(B) A judge shall be deemed to have a financial interest within the meaning of this paragraph if:

(i) A spouse or minor child living in the household has a financial interest.

(ii) The judge or the spouse of the judge is a fiduciary who has a financial interest.

(C) A judge has a duty to make reasonable efforts to inform himself or herself about his or her personal and fiduciary interests and those of his or her spouse and the personal financial interests of children living in the household.

(4) The judge, or the spouse of the judge, or a person within the third degree of relationship to either of them, or the spouse of such a person is a party to the proceeding or an officer, director, or trustee of a party.

(5) A lawyer or a spouse of a lawyer in the proceeding is the spouse, former spouse, child, sibling, or parent of the judge or the judge's spouse or if such a person is associated in the private practice of law with a lawyer in the proceeding.

(6) (A) For any reason:

(i) The judge believes his or her recusal would further the interests of justice.

(ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial.

(iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

(B) Bias or prejudice toward a lawyer in the proceeding may be grounds for disqualification.

(7) By reason of permanent or temporary physical impairment, the judge is unable to properly perceive the evidence or is unable to properly conduct the proceeding.

(8) (A) The judge has a current arrangement concerning prospective employment or other compensated service as a dispute resolution neutral or is participating in, or, within the last two years has participated in, discussions regarding prospective employment or service as a dispute resolution neutral, or has been engaged in such employment or service, and any of the following applies:

(i) The arrangement is, or the prior employment or discussion was, with a party to the proceeding.

(ii) The matter before the judge includes issues relating to the enforcement of either an agreement to submit a dispute to an alternative dispute resolution process or an award or other final decision by a dispute resolution neutral.

(iii) The judge directs the parties to participate in an alternative dispute resolution process in which the dispute resolution neutral will be an individual or entity with whom the judge has the arrangement, has previously been employed or served, or is discussing or has discussed the employment or service.

(iv) The judge will select a dispute resolution neutral or entity to conduct an alternative dispute resolution process in the matter before the judge, and among those available for selection is an individual or entity with whom the judge has the arrangement, with whom the judge has previously been employed or served, or with whom the judge is discussing or has discussed the employment or service.

(B) For the purposes of this paragraph, all of the following apply:

(i) "Participating in discussions" or "has participated in discussion" means that the judge solicited or otherwise indicated an interest in accepting or negotiating possible employment or service as an alternative dispute resolution neutral or responded to an unsolicited statement regarding, or an offer of, such employment or service by expressing an interest in that employment or service, making any inquiry regarding the employment or service, or encouraging the person making the statement or offer to provide additional information about that possible employment or service. If a judge's response to an unsolicited statement regarding, a question about, or offer of, prospective employment or other compensated service as a dispute resolution neutral is limited to responding negatively, declining the offer, or declining to discuss such employment or service, that response does not constitute participating in discussions.

(ii) "Party" includes the parent, subsidiary, or other legal affiliate of any entity that is a party and is involved in the transaction, contract, or facts that gave rise to the issues subject to the proceeding.

(iii) "Dispute resolution neutral" means an arbitrator, mediator, temporary judge appointed under Section 21 of Article VI of the California Constitution, referee appointed under Section 638 or 639, special master, neutral evaluator, settlement officer, or settlement facilitator.

(b) A judge before whom a proceeding was tried or heard shall be disqualified from participating in any appellate review of that proceeding.

(c) At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.

Section 170.2

It shall not be grounds for disqualification that the judge:

(a) Is or is not a member of a racial, ethnic, religious, sexual or similar group and the proceeding involves the rights of such a group.

(b) Has in any capacity expressed a view on a legal or factual issue presented in the proceeding, except as provided in paragraph (2) of subdivision (a) of, or subdivision (b) or (c) of, Section 170.1.

(c) Has as a lawyer or public official participated in the drafting of laws or in the effort to pass or defeat laws, the meaning, effect or application of which is in issue in the proceeding unless the judge believes that his or her prior involvement was so well known as to raise a reasonable doubt in the public mind as to his or her capacity to be impartial.

Section 170.3

(a) (1) If a judge determines himself or herself to be disqualified, the judge shall notify the presiding judge of the court of his or her recusal and shall not further participate in the proceeding, except as provided in Section 170.4, unless his or her disqualification is waived by the parties as provided in subdivision (b).

(2) If the judge disqualifying himself or herself is the only judge or the presiding judge of the court, the notification shall be sent to the person having authority to assign another judge to replace the disqualified judge.

(b) (1) A judge who determines himself or herself to be disqualified after disclosing the basis for his or her disqualification on the record may ask the parties and their attorneys whether they wish to waive the disqualification, except where the basis for disqualification is as provided in paragraph (2). A waiver of disqualification shall recite the basis for the disqualification, and is effective only when signed by all parties and their attorneys and filed in the record.

(2) There shall be no waiver of disqualification if the basis therefor is either of the following:

(A) The judge has a personal bias or prejudice concerning a party.

(B) The judge served as an attorney in the matter in controversy, or the judge has been a material witness concerning that matter.

(3) The judge shall not seek to induce a waiver and shall avoid any effort to discover which lawyers or parties favored or opposed a waiver of disqualification.

(4) If grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding, but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made up to that time shall not be set aside by the judge who replaces the disqualified judge.

(c) (1) If a judge who should disqualify himself or herself refuses or fails to do so, any party may file with the clerk a written verified statement objecting to the hearing or trial before the judge and setting forth the facts constituting the grounds for disqualification of the judge. The statement shall be presented at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification. Copies of the statement shall be served on each party or his or her attorney who has appeared and shall be personally served on the judge alleged to be disqualified, or on his or her clerk, provided that the judge is present in the courthouse or in chambers.

(2) Without conceding his or her disqualification, a judge whose impartiality has been challenged by the filing of a written statement may request any other judge agreed upon by the parties to sit and act in his or her place.

(3) Within 10 days after the filing or service, whichever is later, the judge may file a consent to disqualification in which case the judge shall notify the presiding judge or the person authorized to

appoint a replacement of his or her recusal as provided in subdivision (a), or the judge may file a written verified answer admitting or denying any or all of the allegations contained in the party's statement and setting forth any additional facts material or relevant to the question of disqualification. The clerk shall forthwith transmit a copy of the judge's answer to each party or his or her attorney who has appeared in the action.

(4) A judge who fails to file a consent or answer within the time allowed shall be deemed to have consented to his or her disqualification and the clerk shall notify the presiding judge or person authorized to appoint a replacement of the recusal as provided in subdivision (a).

(5) A judge who refuses to recuse himself or herself shall not pass upon his or her own disqualification or upon the sufficiency in law, fact, or otherwise, of the statement of disqualification filed by a party. In that case, the question of disqualification shall be heard and determined by another judge agreed upon by all the parties who have appeared or, in the event they are unable to agree within five days of notification of the judge's answer, by a judge selected by the chairperson of the Judicial Council, or if the chairperson is unable to act, the vice chairperson. The clerk shall notify the executive officer of the Judicial Council of the need for a selection. The selection shall be made as expeditiously as possible. No challenge pursuant to this subdivision or Section 170.6 may be made against the judge selected to decide the question of disqualification.

(6) The judge deciding the question of disqualification may decide the question on the basis of the statement of disqualification and answer and any written arguments as the judge requests, or the judge may set the matter for hearing as promptly as practicable. If a hearing is ordered, the judge shall permit the parties and the judge alleged to be disqualified to argue the question of disqualification and shall for good cause shown hear evidence on any disputed issue of fact. If the judge deciding the question of disqualification determines that the judge is disqualified, the judge hearing the question shall notify the presiding judge or the person

having authority to appoint a replacement of the disqualified judge as provided in subdivision (a).

(d) The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding. The petition for the writ shall be filed and served within 10 days after service of written notice of entry of the court's order determining the question of disqualification. If the notice of entry is served by mail, that time shall be extended as provided in subdivision (a) of Section 1013.

Section 170.4

(a) A disqualified judge, notwithstanding his or her disqualification may do any of the following:

(1) Take any action or issue any order necessary to maintain the jurisdiction of the court pending the assignment of a judge not disqualified.

(2) Request any other judge agreed upon by the parties to sit and act in his or her place.

(3) Hear and determine purely default matters.

(4) Issue an order for possession prior to judgment in eminent domain proceedings.

(5) Set proceedings for trial or hearing.

(6) Conduct settlement conferences.

(b) Notwithstanding paragraph (5) of subdivision (c) of Section 170.3, if a statement of disqualification is untimely filed or if on its face it discloses no legal grounds for disqualification, the trial judge against whom it was filed may order it stricken.

(c) (1) If a statement of disqualification is filed after a trial or hearing has commenced by the start of voir dire, by the swearing

of the first witness or by the submission of a motion for decision, the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification. The issue of disqualification shall be referred to another judge for decision as provided in subdivision (a) of Section 170.3, and if it is determined that the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated.

(2) For the purposes of this subdivision, if (A) a proceeding is filed in a single judge court or has been assigned to a single judge for comprehensive disposition, and (B) the proceeding has been set for trial or hearing 30 or more days in advance before a judge whose name was known at the time, the trial or hearing shall be deemed to have commenced 10 days prior to the date scheduled for trial or hearing as to any grounds for disqualification known before that time.

(3) A party may file no more than one statement of disqualification against a judge unless facts suggesting new grounds for disqualification are first learned of or arise after the first statement of disqualification was filed. Repetitive statements of disqualification not alleging facts suggesting new grounds for disqualification shall be stricken by the judge against whom they are filed.

(d) Except as provided in this section, a disqualified judge shall have no power to act in any proceeding after his or her disqualification or after the filing of a statement of disqualification until the question of his or her disqualification has been determined.

Section 170.5

For the purposes of Sections 170 to 170.5, inclusive, the following definitions apply:

(a) "Judge" means judges of the superior courts, and court commissioners and referees.

(b) "Financial interest" means ownership of more than a 1 percent legal or equitable interest in a party, or a legal or equitable interest in a party of a fair market value in excess of one thousand five hundred dollars ($1,500), or a relationship as director, advisor or other active participant in the affairs of a party, except as follows:

(1) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in those securities unless the judge participates in the management of the fund.

(2) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization.

(3) The proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest.

(c) "Officer of a public agency" does not include a Member of the Legislature or a state or local agency official acting in a legislative capacity.

(d) The third degree of relationship shall be calculated according to the civil law system.

(e) "Private practice of law" includes a fee for service, retainer, or salaried representation of private clients or public agencies, but excludes lawyers as full-time employees of public agencies or lawyers working exclusively for legal aid offices, public defender offices, or similar nonprofit entities whose clientele is by law restricted to the indigent.

(f) "Proceeding" means the action, case, cause, motion, or special proceeding to be tried or heard by the judge.

(g) "Fiduciary" includes any executor, trustee, guardian, or administrator.

Section 170.6

(a) (1) No judge, court commissioner, or referee of any superior court of the State of California shall try any civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it shall be established as hereinafter provided that the judge or court commissioner is prejudiced against any party or attorney or the interest of any party or attorney appearing in the action or proceeding.

(2) Any party to or any attorney appearing in any action or proceeding may establish this prejudice by an oral or written motion without notice supported by affidavit or declaration under penalty of perjury or an oral statement under oath that the judge, court commissioner, or referee before whom the action or proceeding is pending or to whom it is assigned is prejudiced against any party or attorney or the interest of the party or attorney so that the party or attorney cannot or believes that he or she cannot have a fair and impartial trial or hearing before the judge, court commissioner, or referee. Where the judge, other than a judge assigned to the case for all purposes, court commissioner, or referee assigned to or who is scheduled to try the cause or hear the matter is known at least 10 days before the date set for trial or hearing, the motion shall be made at least 5 days before that date. If directed to the trial of a cause where there is a master calendar, the motion shall be made to the judge supervising the master calendar not later than the time the cause is assigned for trial. If directed to the trial of a cause that has been assigned to a judge for all purposes, the motion shall be made to the assigned judge or to the presiding judge by a party within 10 days after notice of the all purpose assignment, or if the party has not yet appeared in the action, then within 10 days after the appearance. If the court in which the action is pending is authorized to have no more than one judge and the motion claims that the duly elected or appointed judge of that court is prejudiced, the motion shall be made before the expiration of 30 days from the date of the first appearance in the action of the party who is making the motion or whose attorney is making the motion. In no event shall any judge, court commissioner, or referee entertain the motion if it be made after the drawing of the name of the first juror, or if there be no jury,

after the making of an opening statement by counsel for plaintiff, or if there is no opening statement by counsel for plaintiff, then after swearing in the first witness or the giving of any evidence or after trial of the cause has otherwise commenced. If the motion is directed to a hearing (other than the trial of a cause), the motion shall be made not later than the commencement of the hearing. In the case of trials or hearings not herein specifically provided for, the procedure herein specified shall be followed as nearly as may be. The fact that a judge, court commissioner, or referee has presided at or acted in connection with a pretrial conference or other hearing, proceeding, or motion prior to trial and not involving a determination of contested fact issues relating to the merits shall not preclude the later making of the motion provided for herein at the time and in the manner hereinbefore provided.

A motion under this paragraph may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter. Notwithstanding paragraph (3), the party who filed the appeal that resulted in the reversal of a final judgment of a trial court may make a motion under this section regardless of whether that party or side has previously done so. The motion shall be made within 60 days after the party or the party's attorney has been notified of the assignment.

(3) If the motion is duly presented and the affidavit or declaration under penalty of perjury is duly filed or an oral statement under oath is duly made, thereupon and without any further act or proof, the judge supervising the master calendar, if any, shall assign some other judge, court commissioner, or referee to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge, court commissioner, or referee of the court in which the trial or matter is pending or, if there is no other judge, court commissioner, or referee of the court in which the trial or matter is pending, the Chair of the Judicial Council shall assign some other judge, court commissioner, or referee to try the cause or hear the matter as promptly as possible. Except as provided in this section, no party or attorney shall be permitted to make more than one such motion in any one action or special proceeding pursuant to

this section; and in actions or special proceedings where there may be more than one plaintiff or similar party or more than one defendant or similar party appearing in the action or special proceeding, only one motion for each side may be made in any one action or special proceeding.

(4) Unless required for the convenience of the court or unless good cause is shown, a continuance of the trial or hearing shall not be granted by reason of the making of a motion under this section. If a continuance is granted, the cause or matter shall be continued from day to day or for other limited periods upon the trial or other calendar and shall be reassigned or transferred for trial or hearing as promptly as possible.

(5) Any affidavit filed pursuant to this section shall be in substantially the following form:

(Here set forth court and cause)

State of California,)

PEREMPTORY CHALLENGE

County of _____) ss.

_____, being duly sworn, deposes and says: That he or she is a party (or attorney for a party) to the within action (or special proceeding). That _____ the judge, court commissioner, or referee before whom the trial of the (or a hearing in the) aforesaid action (or special proceeding) is pending (or to whom it is assigned) is prejudiced against the party (or his or her attorney) or the interest of the party (or his or her attorney)

so that affiant cannot or believes that he or she cannot have a

fair and impartial trial or hearing before the judge, court

commissioner, or referee.

Subscribed and sworn to before me this

____ day of ____, 20__.

(Clerk or notary public or other

officer administering oath)

(6) Any oral statement under oath or declaration under penalty of perjury made pursuant to this section shall include substantially the same contents as the affidavit above.

(b) Nothing in this section shall affect or limit Section 170 or Title 4 (commencing with Section 392) of Part 2, and this section shall be construed as cumulative thereto.

(c) If any provision of this section or the application to any person or circumstance is held invalid, that invalidity shall not affect other provisions or applications of the section that can be given effect without the invalid provision or application and to this end the provisions of this section are declared to be severable.

Section 170.7

Section 170.6 does not apply to a judge designated or assigned to serve on the appellate division of a superior court in the judge's capacity as a judge of that division.

Section 170.8

When there is no judge of a court qualified to hear an action or proceeding, the clerk shall forthwith notify the Chairman of the Judicial Council of that fact. The judge assigned by the Chairman

of the Judicial Council shall hear the action or proceeding at the time fixed therefor or, if no time has been fixed or good cause appears for changing the time theretofore fixed, the judge shall fix a time for hearing in accordance with law and rules and hear the action or proceeding at the time so fixed.

Section 170.9

(a) No judge shall accept gifts from any single source in any calendar year with a total value of more than two hundred fifty dollars ($250). This section shall not be construed to authorize the receipt of gifts that would otherwise be prohibited by the California Code of Judicial Ethics adopted by the California Supreme Court or any other provision of law.

(b) This section shall not prohibit or limit the following:

(1) Payments, advances, or reimbursements for travel and related lodging and subsistence permitted by subdivision (e).

(2) Wedding gifts and gifts exchanged between individuals on birthdays, holidays and other similar occasions, provided that the gifts exchanged are not substantially disproportionate in value.

(3) A gift, bequest, favor, or loan from any person whose preexisting relationship with a judge would prevent the judge from hearing a case involving that person, under the Code of Judicial Ethics adopted by the California Supreme Court.

(c) For purposes of this section, "judge" means judges of the superior courts, and justices of the courts of appeal or the Supreme Court.

(d) The gift limitation amounts in this section shall be adjusted biennially by the Commission on Judicial Performance to reflect changes in the Consumer Price Index, rounded to the nearest ten dollars ($10).

(e) Payments, advances, or reimbursements, for travel, including actual transportation and related lodging and subsistence which is

reasonably related to a judicial or governmental purpose, or to an issue of state, national, or international public policy, is not prohibited or limited by this section if any of the following apply:

(1) The travel is in connection with a speech, practice demonstration, or group or panel discussion given or participated in by the judge, the lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the speech, demonstration, or discussion, and the travel is within the United States.

(2) The travel is provided by a government, a governmental agency or authority, a foreign government, a foreign bar association, an international service organization, a bona fide public or private educational institution, as defined in Section 203 of the Revenue and Taxation Code, or a nonprofit charitable or religious organization which is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code, or by a person domiciled outside the United States who substantially satisfies the requirements for tax exempt status under Section 501(c)(3) of the Internal Revenue Code.

For purposes of this section, "foreign bar association" means an association of attorneys located outside the United States (A) that performs functions substantially equivalent to those performed by state or local bar associations in this state and (B) that permits membership by attorneys in that country representing various legal specialties and does not limit membership to attorneys generally representing one side or another in litigation. "International service organization" means a bona fide international service organization of which the judge is a member. A judge who accepts travel payments from an international service organization pursuant to this subdivision shall not preside over or participate in decisions affecting that organization, its state or local chapters, or its local members.

(3) The travel is provided by a state or local bar association or judges professional association in connection with testimony before a governmental body or attendance at any professional function hosted by the bar association or judges professional

association, the lodging and subsistence expenses are limited to the day immediately preceding, the day of, and the day immediately following the professional function.

(f) Payments, advances, and reimbursements for travel not described in subdivision (e) are subject to the limit in subdivision (a).

(g) No judge shall accept any honorarium.

(h) "Honorarium" means any payment made in consideration for any speech given, article published, or attendance at any public or private conference, convention, meeting, social event, meal or like gathering.

(i) "Honorarium" does not include earned income for personal services which are customarily provided in connection with the practice of a bona fide business, trade, or profession, such as teaching or writing for a publisher, and does not include fees or other things of value received pursuant to Section 94.5 of the Penal Code for performance of a marriage.

For purposes of this section, "teaching" shall include presentations to impart educational information to lawyers in events qualifying for credit under Mandatory Continuing Legal Education, to students in bona fide educational institutions, and to associations or groups of judges.

(j) Subdivision (a) and (e) shall apply to all payments, advances, reimbursements for travel and related lodging and subsistence.

(k) This section does not apply to any honorarium that is not used and, within 30 days after receipt, is either returned to the donor or delivered to the Controller for deposit in the General Fund without being claimed as a deduction from income for tax purposes.

(l) "Gift" means any payment to the extent that consideration of equal or greater value is not received and includes a rebate or discount in the price of anything of value unless the rebate or discount is made in the regular course of business to members of

the public without regard to official status. Any person, other than a defendant in a criminal action, who claims that a payment is not a gift by reason of receipt of consideration has the burden of proving that the consideration received is of equal or greater value. However, the term "gift" does not include:

(1) Informational material such as books, reports, pamphlets, calendars, periodicals, cassettes and discs, or free or reduced-price admission, tuition, or registration, for informational conferences or seminars. No payment for travel or reimbursement for any expenses shall be deemed "informational material."

(2) Gifts which are not used and which, within 30 days after receipt, are returned to the donor or delivered to a charitable organization without being claimed as a charitable contribution for tax purposes.

(3) Gifts from a judge's spouse, child, parent, grandparent, grandchild, brother, sister, parent-in-law, brother-in-law, sister-in-law, nephew, niece, aunt, uncle, or first cousin or the spouse of any such person; provided that a gift from any such person shall be considered a gift if the donor is acting as an agent or intermediary for any person not covered by this paragraph.

(4) Campaign contributions required to be reported under Chapter 4 (commencing with Section 84100) of Title 9 of the Government Code.

(5) Any devise or inheritance.

(6) Personalized plaques and trophies with an individual value of less than two hundred fifty dollars ($250).

(7) Admission to events hosted by state or local bar associations or judges' professional associations, and provision of related food and beverages at such events, when attendance does not require "travel" as described in paragraph (3) of subdivision (e).

(m) The Commission on Judicial Performance shall enforce the prohibitions of this section.

Canon 3[2]

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law* and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Commentary:
The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.
A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law*. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

> (a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:
>
> > (i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

Civil Code Section 3355

Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer.

Probate Code Section 859

If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to the estate of a decedent, conservatee, minor, or trust, the person shall be liable for twice the value of the property recovered by an action under this part. The remedy provided in this section shall be in addition to any other remedies available in law to a trustee, guardian or conservator, or personal representative or other successor in interest of a decedent.

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 1891 Titus Street, San Diego, CA 92110. In the ordinary course of business, correspondence is deposited with the United States Postal Service that same day.

On April 28, 2007 I served three copies (3) of the within document(s) described as: CORRECTED PETITION FOR WRIT OF CERTIORARI; APPENDIX TO PETITION FOR WRITE OF CERTIORARI by U.S. MAIL to the following:

Randy Berg, Esq.
Gittler & Bradford
10537 Santa Monica Blvd., Third Floor
Los Angeles, CA 90025-4952
Fax: 310 474 4407
Tel: 310 474 4007

I declare under penalty of perjury of the laws of the State of California and the United States that the foregoing is true and correct.

Executed on April 28,2007, at San Diego, California.

Yolanda Balderacchi

Yolanda Balderacchi